Supreme Court, U.S.
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No. 00-1776

IN THE

Supreme Court of the United States

JIMMY L. DUNCAN,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a plaintiff who seeks to establish a significant impairment in the major life activity of working required to present quantitative evidence regarding the jobs available in his local employment market, to show that he is disqualified from a substantial class or broad range of jobs?

2. May a plaintiff establish that he is significantly impaired in the major life activity of working by showing that he is unable to perform a narrow type of work, such as heavy lifting, without regard to the number and types of jobs for which he remains qualified in the local employment market?

3. Under the Americans with Disabilities Act, does heavy lifting constitute a class of jobs for purposes of showing a significant impairment of the major life activity of working?

LISTING OF AFFILIATES PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondent Washington Metropolitan Area Transit Authority ("WMATA") states that it is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress. *See* Pub. L. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Affiliates Pursuant to Rule 29.1	ii
Table of Contents	iii
Table of Cited Authorities	iv
Introduction	1
Statement of the Case	5
Statement of Facts	6
Reasons for Denying the Writ	8
I. The Decision Below Is Consistent With This Court's Decisions In *Sutton*, *Albertson's* And *Murphy*.	8
II. There Is No Split In The Circuits	12
III. The Watered Down Standard Urged By Petitioner Is Inconsistent With *Albertson's*.	16
IV. Working Is *Not* A Major Life Activity	20
Conclusion	23

TABLE OF CITED AUTHORITIES

Page

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 8, 9, 16, 21

Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996) 11, 13

Bartlett v. NY State Board of Law Examiners, 226 F.3d 69 (2d Cir. 2000) 15

Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997) .. 12

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 3

Bolton v. Scrivener, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) 2, 13

Broussard v. University of California, 192 F.3d 1252 (9th Cir. 1999) 2, 11, 13, 14, 18

Burns v. Coca-Cola Enter., Inc., 222 F.3d 247 (6th Cir. 2000) 14, 15

Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996) 12

Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d. Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999) 12

Doren v. Battle Creek Health System, 187 F.3d 595 (6th Cir. 1999) 2

Cited Authorities

Page

Dupre v. Charter Behavioral Health Systems, 242 F.3d 610 (5th Cir. 2001) 2, 13, 18

EEOC v. Rockwell Int'l. Corp., 243 F.3d 1012 (7th Cir. 2001) 2, 12, 13, 14, 17

Fjellestad v. Pizza Hut, 188 F.3d 944 (8th Cir. 1999) 15

Hess v. Port Auth. Tran-Hudson Corp., 513 U.S. 30 (1994) 4

Heyman v. Queens Village Committee for Mental Health, 198 F.3d 68 (2d Cir. 1999) 12

Judy Jones v. WMATA, 205 F.3d 428 (D.C. Cir. 2000) 4

Kirkinburg v. Albertson's, Inc., 143 F.3d.1228 (9th Cir. 1998) 8

McKay v. Toyota Motor Mfg., 110 F.3d 369 (6th Cir. 1997) 3

Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998) 13, 15, 16

Morris v WMATA, 781 F.2d. 218 (D.C. Cir. 1986) .. 4

Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) .. 11

Mullins v. Crowell, 228 F.3d 1305 (11th Cir. 2000) 14, 15

Cited Authorities

Page

Murphy v. UPS, 527 U.S. 516 (1999) ... 1, 8, 10, 11, 12, 21

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999) 15

Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) 13

Skorup v. Modern Door Corp., 153 F.3d 512 (7th Cir. 1998) 13

Sutton v. United Air Lines, 527 U.S. 471 (1999) ..... *passim*

Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) 11, 13

Toyota Motor Mfg., Ky., Inc. v. Williams, cert. granted, 69 U.S.L.W. 3665 (U.S. April 16, 2001) 2, 23

Webb v. Garelick Mfg. Co., 94 F.3d 484 (8th Cir. 1996) 11

Wellington v. Lyon County School Dist., 187 F.3d 1150 (9th Cir. 1999) 11, 14

Williams v. Toyota Motor Mfg., 224 F.3d 840 (6th Cir. 2000) 2, 3

Cited Authorities

	Page
Statutes:	
42 U.S.C. § 12101	4
42 U.S.C. § 12101(b)	21
42 U.S.C. § 12102(2)	21
Rule:	
United State Supreme Court Rule 10	4
Regulations:	
20 C.F.R. § 404.1567	7
29 C.F.R. § 1630.2(i)	22
29 C.F.R. §1630.2(j)	17
29 C.F.R. § 1630.2(j)(3)	22
29 C.F.R. § 1630.2(j)(3)(i)	10
29 C.F.R. § 1630.2(j)(3)(ii)	11, 12

Cited Authorities

Page

Other Authorities:

Stephen W. Jones, *The Supreme Court Reins In The Americans With Disabilities Act*, 22 U. Ark. Little Rock L. Rev. 183 (2000) 2

Jeffrey A. Van Detta & Dr. Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505 (2000) 2

What Does Disability Mean: The Americans With Disabilities Act of 1990 In The Aftermath of Sutton, Murphy, and Albertsons, 48 Drake L. Rev. 137 (1999) 2

Miscellaneous:

DOL Dictionary of Occupational Titles (4th Ed. 1991) 16, 18, 19

INTRODUCTION

In *Sutton v. United Air Lines*, 527 U.S. 471 (1999), this Court enunciated the requirements for what a plaintiff must show to establish that he has a substantial impairment in the major life activity of working. This Court required that in determining whether a person is substantially impaired in the major life activity of working, lower courts should consider whether a "host of different jobs" are available in his geographical area. *Id.* at 491-92. Petitioner Duncan argues that he should be able to establish that he is a person with a disability simply by showing that he is precluded from a few jobs due to his impairment. Pet. 6, 13, 23. The United States Court of Appeals for the District of Columbia, sitting en banc, requires that a plaintiff present evidence about the numbers and types of jobs in the labor market for which he is qualified and which remain available despite an impairment, in order to determine the extent to which his prospects for employment have been diminished. Pet. 32a. This is entirely consistent with *Sutton* and therefore the petition for a writ of certiorari should be denied.

At trial, petitioner failed to present quantitative evidence regarding the numbers and types of jobs from which he was disqualified as a result of his back impairment. Petitioner failed to present any evidence regarding whether the number of jobs in the Baltimore-Washington area from which he is disqualified is a dozen or is several thousand. As was the case in *Murphy v. UPS*, 527 U.S. 516 (1999), at best Mr. Duncan established that he was disqualified from working at a few isolated jobs, which is not sufficient to establish that he was substantially limited in the major life activity of working. As a result, the D.C. Circuit correctly found that Mr. Duncan could not establish that he had a substantial limitation in the major life activity of working.

Petitioner argues that this case warrants review because he believes the D.C. Circuit adopted a standard of proof contrary to this Court's holdings and in conflict with other federal circuit courts. There is no true conflict among the circuits and the decision below is consistent with the *Sutton* trilogy. Numerous courts, both before and after *Sutton*, have precluded suits or reversed judgments based upon the insufficiency of evidence regarding jobs available in the relevant labor market where the employee claims to be disabled in the major life activity of working.[1] Commentators have reached the same conclusion that labor market data is necessary to establish a significant limitation of the major life activity of working.[2]

The outcome in *Toyota Motor Mfg., Ky., Inc. v. Williams*, *cert. granted*, 69 U.S.L.W. 3665 (U.S. April 16, 2001) (No. 00-1089) is immaterial to further disposition of this case. *Williams* was decided by the Sixth Circuit not on the "difficult concept" of working, but on the rather "simple concept" that the employee is unable to perform manual tasks. *See Williams v. Toyota Motor Mfg.*, 224 F.3d 840,

1. *EEOC v. Rockwell Int'l. Corp.*, 243 F.3d 1012, 1017 (7th Cir. 2001); *see also Dupre v. Charter Behavioral Health Systems*, 242 F.3d 610 (5th Cir. 2001); *Broussard v. University of California*, 192 F.3d 1252 (9th Cir. 1999); *Doren v. Battle Creek Health System*, 187 F.3d 595, 598 (6th Cir. 1999); and *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995).

2. *See* Jeffrey A. Van Detta & Dr. Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505, 529-531 (2000); Stephen W. Jones, *The Supreme Court Reins In The Americans With Disabilities Act*, 22 U. Ark. Little Rock L. Rev. 183, 196-197 (2000); and *What Does Disability Mean: The Americans With Disabilities Act of 1990 In The Aftermath of Sutton, Murphy, and Albertson's*, 48 Drake L. Rev. 137, 168-69 (1999).

844 (6th Cir. 2000). The question before this Court in that case is whether the Sixth Circuit correctly analyzed *Williams* in terms of a major life activity other than working and correctly found plaintiff Williams to be disabled. In the case at bar, there is no question that the only major life activity at issue is working. The *Duncan* majority relied upon an earlier decision of the Sixth Circuit, *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 372-3 (6th Cir. 1997), which was distinguished by the *Williams* court as involving the major life activity of working. In *McKay*, the Sixth Circuit rejected the argument proffered by petitioner in the case at bar, that a court should only look at the narrow class of jobs from which the employee is disqualified, not at the universe of jobs she can perform, finding that plaintiff was disqualified from a narrow range of assembly line jobs requiring repetitive motion, not from all manufacturing jobs. *McKay*, 110 F.3d at 373. *Williams* will not address the issue which petitioner Duncan seeks to review, the quantum of proof necessary to withstand summary judgment when the major life activity at issue is working.[3]

This Court should decline to grant certiorari in the case at bar for several reasons. First, under *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), decided just a week before the en banc panel issued its decision, federal courts lack jurisdiction over claims against WMATA brought under the Americans With Disabilities Act (ADA),

3. In its petition for certiorari, Toyota challenges the Sixth Circuit's decision to treat a subset of activities relating to working, the ability to perform manual tasks, as limiting a major life activity, asserting that in the Sixth Circuit, a plaintiff "can now simply recast her impairment as a substantial limitation on the major life activity of performing manual tasks." Pet. for Writ of Certiorari at 23, *Toyota v. Williams*, No. 00-1089. Ms. Williams noted that "The Sixth Circuit opinion does not rest on a determination of whether Ms. Williams is substantially limited in the major life activity of working." Opposition to Pet. for Writ of Certiorari at 18, *Toyota v. Williams*, No. 00-1089.

42 U.S.C. § 12101, because WMATA is entitled to Eleventh Amendment immunity under *Hess v. Port Auth. Tran-Hudson Corp.*, 513 U.S. 30, 50 n.20, 52 (1994); *Judy Jones v. WMATA*, 205 F.3d 428, 431-32 (D.C. Cir. 2000); and *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986). Second, the issue presented by the petition would take the Court down a dead end and waste judicial resources. Additional analysis of what constitutes a substantial limitation in the major life activity of working is unnecessary because working is not properly characterized as a major life activity. *See Sutton*, 527 U.S. at 492; and *Duncan*, Judges Randolph, Williams and Sentelle, concurring, Pet. 37a-39a. Finally, whatever standard of proof is adopted, petitioner's case would be dismissed for lack of evidence that he was significantly impaired in any major life activity. Pet. 32a-33a and 41a-42a (Tatel, J, quoting transcript verbatim). To the extent that overarching principles can be supplied to establish the quantum of proof necessary to establish a disability, *Sutton* already provides them.

In addition, there are alternative reasons why WMATA was entitled to judgment as a matter of law. Petitioner's restriction on moderate lifting was temporary rather than permanent, which precludes coverage under the ADA. Moreover, petitioner failed to request reasonable accommodation and otherwise failed to engage in the interactive process.

United States Supreme Court Rule 10 cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." All that is challenged here is the alleged misapplication of the principles enunciated in the *Sutton* trilogy. Review should therefore be denied.

STATEMENT OF THE CASE

Eight of the ten judges of the D.C. Circuit agreed that petitioner offered "no significantly probative evidence below of the number and types of positions available in his local job market so as to demonstrate that his back impairment substantially limits his ability to work." Pet. 28a. These eight judges found that a plaintiff in Duncan's position must

> produce some evidence of the numbers and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.

Pet. 34a. Judge Tatel, concurring, specifically rejected petitioner's contention that there is a broad class of jobs involving heavy lifting, describing this as simply a subclass of jobs requiring manual labor. Pet. 41a. Three judges wrote a separate concurrence, elaborating upon this Court's critique of the concept of working as a major life activity in *Sutton*, 527 U.S. at 492 (1999). They addressed the anomaly that someone's ability to show a substantial limitation in working will vary with economic conditions in the labor market. Chief Judge Edwards, who dissented from the panel decision, remained the lone dissenter when the matter was decided en banc.

Petitioner distorts the holding below when he asserts that the D.C. Circuit held "that an ADA plaintiff, to show a substantial limitation in working, *must* present statistical quantitative evidence on the numbers and types of jobs available to the plaintiff. . . ." Pet. at 4-5, 24. To the contrary, the D.C. Circuit explicitly held that it would leave it to future

counsel to explore the various forms of evidence which would suffice to show that plaintiff is disqualified from a substantial class or broad range of jobs in the local employment market. Pet. at 36a.

STATEMENT OF FACTS

Petitioner Duncan was employed by WMATA for many years as a janitor. In 1992 he became a parts runner in the Automatic Fare Collection (AFC) section of Metrorail operations. Approximately one year later, he was involuntarily transferred to a position as a parts runner in the elevator/escalator (ELES) section. Parts runners convey spare parts from central storerooms to field locations. Employees assigned to the AFC position must be able to regularly lift equipment weighing as much as 30 lbs., whereas employees assigned to the ELES position must be able to regularly lift equipment weighing as much as 75 lbs. Days after he was assigned to the ELES position in early December 1992, Duncan injured his back. In December 1992 and again in January 1993, he presented WMATA with a medical document indicating that he was subject to a 20 lb. weight limitation. This was not the first time such a temporary restriction had been imposed upon him. There were no light duty jobs available for him and for months he remained on leave without pay, without providing WMATA any information about his medical status. In August 1993 he was asked to provide WMATA with information regarding his medical condition. Although he was seen by his neurosurgeon in September 1993, the doctor's report was never provided to WMATA while Duncan was a WMATA employee. Duncan was terminated for failing to comply with the order that he provide documentation justifying his absence from work.

Contrary to his assertions, petitioner provided no evidence establishing that he had a permanent injury or a permanent 20 lb. lifting restriction. Pet. 8, 16, 25. There was no communication from his doctors to WMATA specifying that the 20 lb. restriction was permanent. Mr. Duncan's September 1993 neurological follow-up with his neurosurgeon, Dr. Karim, indicated that he could return to his prior AFC job which required moderate lifting of approximately 30 lbs. At trial, Mr. Duncan proved that he had a degenerative disc problem which caused periodic bouts of acute pain. He proved the existence of an impairment, but nothing else.

Petitioner mischaracterizes the evidence, asserting that he proved that he was precluded from working in three broad categories of jobs. Pet. 8, 16, 25, 28. Petitioner proved only that he was unable to work in two specific jobs, as a truck driver for an unnamed employer and in WMATA's ELES position. There was specific documentary evidence from Dr. Karim that he could perform the job of AFC parts runner, a moderate lifting job. Petitioner presented no evidence at trial that "heavy lifting" constitutes a category of jobs. The strength classifications of jobs established by the Department of Labor (DOL) in 20 C.F.R. § 404.1567, upon which he now relies (Pet. 9), used in analyzing jobs in the authoritative Dictionary of Occupational Titles, do not constitute classes of jobs for purposes of the ADA. Moreover, there was no proof before the jury regarding the DOL job classifications. Even if the strength classifications could establish classes of jobs, here the DOL classifications are the creation of appellate advocacy — they were not introduced as evidence at trial or through instructions for the jury. At trial, the record was entirely silent regarding the class of jobs from which Mr. Duncan was physically disqualified.

Petitioner mischaracterizes his work history by alleging that he has a history of performing only unskilled labor jobs involving heavy lifting. Pet. 8, 12, 28. His work history was limited to performing unskilled manual labor. His sparse testimony gave no indication of whether his prior work, e.g., banquet set up and box making, required heavy, medium or light lifting. His penultimate work for WMATA, as a parts runner in Automatic Fare Collection, involved medium, not heavy, lifting. At trial, Duncan's proof contradicted his present assertion that his experience limited him to heavy lifting work.

Petitioner never requested reasonable accommodation. Pet. at 9. He requested light duty, a temporary status for employees who are receiving workers compensation, which provides them with temporary placements based upon the expectation that they will return to their former job. Light duty is a bridge back to one's most recent job, not a means to obtain a permanent new position. While he was ostensibly disabled, petitioner applied for the permanent vacant AFC parts runner job through competitive procedures, stating that he was fully capable of performing the job.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN *SUTTON*, *ALBERTSON'S* AND *MURPHY*.

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) considered the issue of whether there were sufficient facts for plaintiff to survive summary judgment. Below, the Ninth Circuit had rejected the argument that the employee was not "substantially limited," finding the ADA did not merely protect those with the most severe disabilities. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998).

This Court held that the Ninth Circuit had "undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Albertson's*, 527 U.S. at 565. The Court held that those claiming protection under the ADA must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial." Like the plaintiff in *Albertson's*, Mr. Duncan has failed to adduce sufficient facts that his physical condition significantly constrained his ability to find work. Mr. Duncan's case fails because he presented no evidence regarding the labor market generally and only scant evidence regarding his own efforts at finding employment.

In *Sutton*, 527 U.S. at 483, this Court noted that the definition of "disability" requires a determination of whether a particular impairment substantially limits the "major life activities of such individual." The Court rejected EEOC guidelines which precluded consideration of remedial measures in determining disability status. The Court criticized the EEOC Guidelines because of their focus on the nature of the impairment, rather than upon the effect of the impairment on the life of the individual. The Court opined that this

> would, in many cases, force [courts] to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. . . . Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

Sutton, 527 U.S. at 483-84

In *Murphy*, 527 U.S. at 523, the Court construed 29 C.F.R. § 1630.2(j)(3)(i) as requiring that an ADA plaintiff show that he or she cannot perform a class of jobs. The Court held that the category of jobs requiring a commercial drivers license (CDL) did not constitute a "class of jobs" and, therefore, the plaintiff, who could not obtain a CDL, had not adduced sufficient evidence. It is noteworthy that the CDL requirement, by virtue of its application to all trucks weighing over 10,000 pounds, applies to virtually all long distance trucking in the United States. Likewise, in the case at bar, plaintiff has only shown that he cannot perform unskilled work involving heavy or extremely heavy lifting. Heavy lifting may be a requirement for some jobs, as having a CDL may be for others. Neither requirement describes a class of jobs. Like *Murphy*, Duncan utterly failed to prove that he could not perform a class of jobs.

Both *Sutton* and *Murphy* endorsed the requirement to which petitioner objects, that an employee claiming a substantial limitation in the major life activity of working must present evidence regarding the availability of jobs in the applicable labor market. In *Sutton*, in considering the meaning of a substantial limitation, this Court opined that it

> requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. . . . If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 491-92. This Court cautioned that a restriction adopted by a single employer could not be imputed to the industry generally. *Id.* at 493-94. In *Murphy*, which affirmed the grant of summary judgment for failure to prove a substantial limitation on working, the Court specifically

stated that, "in light of petitioner's skills and *the array of jobs available to petitioner* utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs." *Murphy*, 527 U.S. at 525 (emphasis added). In *Murphy* and *Sutton*, this Court thus recognized that the prevalence of jobs in the labor market should be considered when determining whether the individual is substantially limited in the major life activity of working. *See Murphy*, 527 U.S. at 524 and *Sutton*, 527 U.S. at 492. Petitioner's attack on the decision below for imposing a requirement that plaintiff present evidence on the jobs available to him (Pet. at 13, 26) is simply inconsistent with *Sutton* and *Murphy*.

In the wake of *Sutton*, in ruling on a motion for judgment, a court should consider the degree to which the plaintiff has satisfied the quantitative requirement of 29 C.F.R. § 1630.2(j)(3)(ii) (the regulation specified in *Sutton* and *Murphy*). The following review of cases indicates intra-circuit differences, depending upon whether this regulation was addressed. For example, in the Ninth Circuit, defendants prevailed in *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997), and *Broussard*, 192 F.3d at 1259, where the court discussed the absence of labor market evidence as required under § 1630.2(j)(3)(ii). Yet, in *Wellington v. Lyon School Dist.*, 187 F.3d 1150, 1156 (9th Cir. 1999), where the employee prevailed, the Ninth Circuit completely ignored § 1630.2(j)(3)(ii), and found that plaintiff had satisfied his evidentiary burden. Similarly, when the Eighth Circuit applied § 1630.2(j)(3)(ii) in *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996), it affirmed the grant of summary judgment, finding no disability within the meaning of the ADA, where the plaintiff was limited by a 25 lb. lifting restriction. By contrast, in *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996), the same court ignored § 1630.2(j)(3)(ii) and reversed summary judgment. In *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), which applied these factors, a jury verdict

for plaintiff was reversed, whereas *Heyman v. Queens Village Committee for Mental Health*, 198 F.3d 68 (2d Cir. 1999), cited by petitioner, failed entirely to address the specific requirements of the major life activity of working contained in § 1630.2(j)(3)(ii). *Compare Rockwell*, 243 F.3d 1012, 1017-18 (7th Cir. 2001) (EEOC must provide evidence of the number and types of other jobs in Southern Illinois from which the applicants would be excluded) *with Best v. Shell Oil Co.*, 107 F.3d 544, 548-9 (7th Cir. 1997)[4] *and Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) (neither pre-*Sutton* opinion mentioned § 1630.2(j)(3)(ii)).

Petitioner simply objects to the standard adopted in *Sutton* and *Murphy*. The logic of *Sutton* is that proof regarding the number of jobs available and proof regarding the number of jobs from which one is precluded are related concepts. If the number of jobs from which one is precluded, compared to the total number of jobs which would have been available but for the impairment (i.e., jobs precluded plus jobs available), is a small percentage, one is not significantly impaired in working. If the number of jobs from which one is precluded, compared to the total number of jobs which would have been available is a large percentage, one is significantly impaired in working.

II. THERE IS NO SPLIT IN THE CIRCUITS

The en banc decision in *Duncan* is consistent with the reasoning and holdings of at least seven appellate courts. *See Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 647 (2d. Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999)

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4. *Best*, 107 F.3d at 548, is completely inconsistent with *Murphy* since *Best* impliedly held that an inability to drive trucks with a clutch constituted a class of jobs, while *Murphy* held that an inability to drive trucks requiring a commercial drivers license did not constitute an inability to perform a class of jobs.

(reversing jury verdict in favor of three police officers in an ADA case for want of evidence); *Mondzelewski v. Pathmark Stores*, 162 F.3d 778, 785 (3d Cir. 1998) (illustrating plaintiff's reliance on expert testimony from vocational rehabilitation specialist); *Dupre v. Charter Behavioral Health Systems*, 242 F.3d 610, 614 (5th Cir. 2001) (faulting plaintiff because she "presented no evidence that she would be disqualified from all jobs requiring manual labor"); *Sherrod v. American Airlines, Inc.*, 132 F.3d at 1112, 1120 (5th Cir. 1998) (noting plaintiff's inability to present evidence of the number and types of jobs from which she is disqualified or evidence that her training and skills limit her to jobs requiring heavy lifting); *Rockwell Int'l. Corp.*, 243 F.3d at 1017-18 (7th Cir. 2001) (faulting the EEOC for providing no evidence of whether plaintiff was foreclosed from employment in Southern Illinois, other than the four Rockwell jobs); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) (faulting employee for providing "no evidence of the number of jobs from which she is precluded because of this impairment"); *Aucutt*, 85 F.3d at 1319 (8th Cir. 1996) (affirming summary judgment for employer, where employee had angina and coronary artery disease in addition to having a 25 lb. lifting restricting); *Thompson*, 121 F.3d at 540 (9th Cir. 1997) (faulting employee for failing to show that she was disqualified from an entire class of jobs); *Broussard*, 192 F.3d at 1257-58 (9th Cir. 1999) (affirming summary judgment for employer where the rehabilitation counselor based his conclusions on categories of jobs, i.e., 'sedentary' and 'light manual"); and *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (involving an order selector, whose work was comparable to Mr. Duncan's). In *Duncan*, Chief Judge Edwards, dissenting, correctly stated "there is no magical legal standard for measuring substantial limitation." Pet. 50a. The case by case nature of the disability determination makes it difficult to establish a conflict among

the circuits and militates against granting the instant petition. The variation in outcomes is most often attributable to differences in fact patterns.

No court has held that there is a per se rule that expert evidence is required. *Duncan*, Pet. 35a; *Mullins v. Crowell*, 228 F.3d 1305, 1327 n.18 (11th Cir. 2000); and *Rockwell*, 243 F.3d at 1017. Although the D.C. Circuit requires quantitative information, it does not require "statistical information." It found that although expert vocational testimony is very persuasive, it is not required. Pet. 35a.

Petitioner erroneously contends that the en banc court "candidly recognized that its decision was directly contrary to decisions of the Sixth, Ninth and Eleventh Circuits." Pet. at 10. The en banc court did recognize that its decision was contrary to *Wellington*[5], introducing its treatment of that case with the signal "but see." The next two decisions cited by the D.C. Circuit, *Burns v. Coca-Cola Enter., Inc.*, 222 F.3d 247 (6th Cir. 2000) and *Mullins*, were introduced with the signal, "cf," indicating support for the main proposition espoused by the D.C. Circuit, not contradiction. This is hardly surprising, since in *Burns*, the Sixth Circuit went to great lengths to explain that the district court had made the requisite individualized showing, finding the employee disabled "because his back injury precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience." *Burns*, 222 F.3d

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5. In her original panel decision, Judge Henderson disparaged *Wellington* because, although it was decided after *Sutton*, it did not address *Sutton*. A later decision of the Ninth Circuit, *Broussard*, 192 F.3d at 1257-58, did address *Sutton* and considered the sufficiency of the evidence, based upon the declaration of a vocational rehabilitation specialist regarding the percentage of jobs from which plaintiff was barred in the relevant geographic area. Pet. at 7a n.3.

at 253.[6] In *Mullins*, the court noted that the plaintiff could satisfy his evidentiary burden without expert evidence by testifying about his own extensive job search. 228 F.3d at 1315 n.18. Thus, there is no conflict among the circuits with respect to the issue petitioner seeks to present.

Several of the cases cited by petitioner do not support his contention that there is a split among the circuits. For example, petitioner identifies *Bartlett v. NY State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000) as being in conflict with the decision in *Duncan*. *Bartlett* specifically held that the court's role is to compare the jobs utilizing an employee's training, knowledge, skills or abilities with the jobs from which the employee is excluded, and to determine whether the employee thereby faces "a significant restriction with respect to" the jobs available. 226 F.3d at 83. In reversing and remanding to the district court, the Second Circuit held that the plaintiff must prove that it is "the impairment and not some other factor or factors, that causes the substantial limitation." 226 F.3d at 84-85.

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6. Contrary to petitioners' description, the decision was not based "solely upon Burns' limited educational background and work experience along with his physician's testimony." Pet. 18. The trial court relied upon the affidavit of a vocational consultant, who supplied expert testimony regarding the effect of the impairment on the plaintiff's employment prospects. *Burns v. Coca Cola*, No. 3:97-cv-746 (E.D.Tenn. Aug. 26, 1998). Such testimony, which has made the difference for many plaintiffs, is lacking here. *See Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 785 (3d Cir. 1998) and *Fjellestad v. Pizza Hut*, 188 F.3d 944, 948-49 (8th Cir. 1999). In *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 12 (1st Cir. 1999), the court found there was evidence that in Maine, where Quint lived, physically demanding jobs are a mainstay, finding that a medical doctor had qualified at the trial to render an expert opinion regarding the prevalence of physical labor jobs in Maine and found that this evidence was sufficient to present a triable issue of fact.

Mondzelewski, 162 F.3d at 785, also cited in support of the notion of a split among the circuits, adopts the requirement that to establish a significant impairment in the major life activity of working "require[s] evidence of the approximate number of jobs from which the individual is precluded from working." In *Mondzelewski*, plaintiff surmounted this evidentiary hurdle by presenting the report of a vocational rehabilitation expert which showed that there were an extremely small number of jobs listed in DOL's *Dictionary of Occupational Titles* for which he was qualified and that there were few employment prospects in Mondzelewski's geographical area. This is precisely the kind of evidence missing from the instant case. Duncan's vague testimony regarding the jobs he sought does not satisfy this evidentiary standard.

III. THE WATERED DOWN STANDARD URGED BY PETITIONER IS INCONSISTENT WITH *ALBERTSON'S.*

In *Albertson's*, 527 U.S. at 564-65, this Court criticized the Ninth Circuit for being "too quick to find a disability," finding that the appellate court had watered down the statutory requirement of a "significant restriction" in an individual's ability to perform a major life activity to a showing of a "mere difference," without regard to the effect of the impairment on his ability to work. Duncan argues that "injured people who have a reduction in the available job pool and are precluded from a class of jobs or significantly restricted from a broad range of jobs should be protected by the statute." Pet. at 26. The fatal flaw in this argument is that it denies the need for a showing of relative magnitude. One has not suffered a significant impairment in working if the diminution in employment prospects is small. Even if heavy lifting constituted a "class of jobs," disability status would depend on whether there is a relatively large or small

number of jobs available in the applicable job market for which an employee is still qualified notwithstanding his impairment.

Petitioner's proposed lesser standard of proof, to be satisfied by testimony as to his back problem, his limited education and lack of transferable skills (Pet. 13, 28), would dilute the requirement of a significant restriction, transforming it into a showing of a mere effect. If petitioner's argument were accepted, then the population of persons who could claim protection under the ADA would swell enormously. This is clearly inconsistent with *Sutton*, which expressly determined that the potential population of persons with disabilities was in the 43 million range, not in the 160 million range. *Sutton*, 527 U.S. at 463-64.

Petitioner contends that no quantitative information is required to establish a substantial impairment in working, as all that is required is a showing of preclusion from a class of jobs. Pet. 25, 26, 28. This is a concept derived from an example in the EEOC's Guidelines, which was rejected by the Panel, although not discussed by the en banc court in *Duncan*. Pet. 3-4, 17 n.5, and Pet. 7a and 10a. The Guidelines state that disqualification from performing heavy labor jobs because of a back condition satisfies the requirement of showing a substantial limitation, even if the individual were able to perform work in another class of jobs. 29 C.F.R. § 1630.2(j), app. This guideline and the assumption it embodies are contrary to *Sutton* and its progeny. The en banc court characterized *Sutton* as making clear that "whether an impairment substantially limits the major life activity of working depends primarily on the availability of jobs for which the impaired person qualifies," which is an individualized inquiry. Pet. 32a-33a. *See Rockwell*, 243 F.3d at 1017 (". . . according to the Commission's own regulations, its case must include some proof of the 'number and types of jobs' within the 'geographical area to which the

claimant has reasonable access.' "); *Dupre*, 242 F.3d at 614 ("There exist, however, many jobs involving only light labor that Dupre seemed perfectly capable of performing."); and *Broussard*, 192 F.3d at 1258-59 ("it does require . . . evidence from which one might infer that plaintiff faced significant restrictions in her ability to meet the requirements of other jobs.") These decisions of the Fifth, Seventh, and Ninth Circuits, all of which properly applied *Sutton*, are consistent with the decision of the D.C. Circuit below in holding that labor market information is required to permit a trier of fact to assess the actual impact of the impairment. Petitioner's argument, that such information is in his case superfluous, is at odds with *Sutton*.

The "class of jobs" concept urged by petitioner is so open-ended as to be meaningless. Duncan defines the class of jobs as heavy lifting jobs. A second litigant might define a class of jobs as those requiring concentration. A third might define a class of jobs as those requiring one to stand all day long. The common analytical problem is that they posit a class of jobs in terms of functional limitations rather than in the context of the labor market's notion of related occupations and professions. A benchmark for identifying what jobs might constitute a class is contained in the Dictionary of Occupational Titles, published by the Department of Labor. *See* DOL, *Dictionary of Occupational Titles* (4th Ed. 1991), *at http://www.oalj.dol.gov/libdot.htm.* It does not identify heavy lifting as a job title. The Dictionary of Occupational Titles analyzes thousands of jobs within discrete groups of job families. These job families would more naturally be characterized as "classes of jobs" as intended by *Sutton*. Each job within a job family is analyzed in terms of its strength requirements as well as multiple other requirements.

Within the job family of "Occupations in Moving and Storing Materials" identified in the Dictionary, the strength

requirements for individual jobs range from light to medium to heavy. DOL, *Dictionary of Occupational Titles* § 922 (4th ed. 1991). Laborer, Stores (Job No. 922.687-058) is the job within this family most akin to Duncan's job and it requires medium lifting. "Laborer, Stores" is described as order picker, parts picker, stock selector and warehouse worker, whose incumbents "convey materials or items from receiving or production areas to storage or other designated areas by hand, handtruck or electric handtruck." Petitioner conceded that despite his impairment, he remained qualified for the AFC parts runner job, which entails lifting parts weighing as much as 30 pounds.

Petitioner suggests that this Court adopt one evidentiary rule for skilled personnel and another for unskilled personnel because, in the case of unskilled personnel, requiring quantitative evidence "is superfluous." Pet. 22-23. Petitioner suggests that there are circumstances where the employee would "obviously" be precluded from a class of jobs, as is the case with him. Pet. 22 n.8. Petitioner offers no means to distinguish between these two groups.[7] It was not obvious to nine judges of the D.C. Circuit that he was precluded from a class of jobs. Plaintiff asks, why he should have to provide the number and types of "unskilled manual jobs that were unavailable in this area if one's impairment precluded one from doing all such work?" Pet. at 23. The answer is that it matters a great deal whether the number of unskilled manual jobs in the region is 100 or 10,000, and whether most of those jobs involve heavy, medium or light lifting, since at trial Mr. Duncan did not claim that he could not perform all manual jobs, only those requiring heavy lifting. It matters a

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7. Likewise, he contends that the class of jobs requiring heavy lifting is much broader than the airline pilots class of job. Pet. 25. This is not empirically self evident, at least in the Washington metropolitan area and evidence would be required to establish that element of his burden of proof.

great deal whether his inability to find work is because his job hunt was half-hearted and inadequate or whether he was disadvantaged by his impairment.

Mr. Duncan suggests that his lack of education and lack of experience in jobs that did not require heavy lifting supports an inference that his impairment created a significant barrier to employment. Pet. 23. This is farfetched because Mr. Duncan sought unskilled laborer's work, for which advanced education and prior experience in particular tasks is by definition not required. To obtain unskilled work, a person must show that he or she has the basic traits to hold down a job, such as the ability to reliably and punctually report to work. Under *Sutton*, a finding that a disability presents a barrier to employment must be based upon quantitative evidence derived from the relevant geographical market

IV. WORKING IS *NOT* A MAJOR LIFE ACTIVITY

This Court should also decline to grant certiorari because it is likely that in a future case, this Court will reject the concept of working as a major life activity, and therefore the evidentiary standards at issue here will become moot. In *Sutton*, the Court indicated that it has grave reservations about the propriety of classifying "working" as a "major life activity." Declining to resolve the issue, it noted:

> there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."

Sutton, 527 U.S. at 492.

The EEOC, rather than Congress, has defined "working" as a major life activity. The ADA defines the word disability in terms of its substantial limitation on major life activities without defining the phrase "major life activities." 42 U.S.C. § 12102(2) (1995). In *Sutton*, this Court specifically found that "no agency has been delegated authority to interpret the term 'disability.' " *Sutton*, 527 U.S. at 479. The Court declined to decide what level of deference should be afforded to the EEOC's ADA regulations. *Murphy*, 527 U.S. at 523, and *Albertsons*, 527 U.S. at 563 n.10.

Working is not a major life activity because it is not an aspect of basic human physical or mental functioning. When an individual cannot perform a broad category of jobs, it is because an impairment has a substantial effect on his mental or physical functioning, *which in turn* makes it difficult or impossible to work. The employee should be able to show that there is a causal relationship between the impairment and the reduced prospects for employment: i.e., the impairment's physical or mental consequences in terms of the gross inability to perform some basic aspect of human life functions. If the employee can make this showing of gross impairment of functioning, there is no need to address the curtailment of employment.

The three judges who concurred in *Duncan* pointed out several conceptual problems involved with treating work as a major life activity. Pet. 37a-39a. They observed that the existence of a disability will turn on factors more economic than physical or medical. For example, in a period of high unemployment, more people would be found disabled, because the more difficult it is to find employment, the more likely that an employee can establish a substantial limitation in working. These judges noted that this is inconsistent with Congress' stated purpose that the ADA supply "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

Even the EEOC recognizes that "working" is different from other major life activities, because there are additional criteria which must be met. 29 C.F.R. § 1630.2(j)(3) (1999). The Interpretative Guidelines provide that if an employee is substantially limited in some other major life activity, no determination should be made with regard to working. § 1630.2(i). The use of working as a major life activity poses substantial problems when an employee requests that his employer provide reasonable accommodation, such as a job modification, on the basis of his inability to perform his present job. At the time the request is made, neither employee nor employer has information about the employee's prospects for other employment. Yet, the law is clear that the inability to perform one's existing job cannot constitute the basis for a finding of substantial impairment of the major life activity of working. Conceptually, working cannot be the major life activity used to establish one's disabled status.

CONCLUSION

This case does not satisfy the requirements for granting certiorari because the decision of the en banc court in *Duncan* is consistent with applicable precedent of this Court and of circuit courts interpreting the *Sutton* trilogy. Thus, the Petition for a Writ of Certiorari should be denied. The decision in *Williams* will not address the primary issue on which WMATA was granted judgment as a matter of law, the quantum of proof necessary to take a case to a jury, and thus this case should not be stayed pending its resolution.

Respectfully submitted,

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